

2 FAM 500 LEGAL AFFAIRS

2 FAM 510 SERVICE OF LEGAL PROCESS

(TL:GEN-233; 8-29-85)

2 FAM 511 SUBPOENAS

*(TL:GEN-233; 8-29-85)
(State Only)*

Subpoenas from courts or quasi-judicial tribunals (such as workmen's compensation boards, and regulatory commissions) for the production of 20 Department or Foreign Service records or testimony of Departmental or Foreign Service employees arising out of their official duties will normally be addressed to the Secretary of State, to the custodian of records if records are involved, or to an individual officer who is supposed to have knowledge of the matter at issue.

2 FAM 511.1 Handling of Service of Legal Process

*(TL:GEN-233; 8-29-85)
(State Only)*

- a. Officers who are served with subpoenas for records or testimony involving official duties should take note of when and how and by whom it is served and immediately inform the assistant legal adviser who advises the interested bureau or office. Subpoenas commonly are returnable in a very short time, so prompt action is essential. Any correspondence or conversation with the party serving the subpoena or the party's attorney should also be reported.
- b. Under Pub. Law 93-647 (42 U.S.C. 659), remuneration for employment by the Government is subject to garnishment or attachment for child support, alimony, and separate maintenance obligations of employees. Anyone receiving legal process for garnishment or attachment of remuneration of an employment of the Department or the Foreign Service shall promptly forward the process to the Executive Office of the Office of

the Legal Adviser (L/EX), with a notation of when, how, and by whom served. The Office of the Legal Adviser (L) will review the process for legal sufficiency. If it is legally sufficient, L will forward the process through the Office of Civil Service Career Development and Assignments (PER/CCA) or Office of Management (PER/MGT), as appropriate, to M/COMP/FO, which will determine whether adequate information has been supplied to permit fiscal action. If not, it will be returned to L; otherwise, the Office of Financial Operations (M/COMP/FO) will initiate appropriate action. M/COMP/FO will notify the employee or annuitant who is the subject of the garnishment for attachment that the process has been received. The employee or annuitant affected has the responsibility to present any defenses to the court issuing the process.

2 FAM 511.2 The Office of the Legal Adviser (L)

(TL:GEN-233; 8-29-85)
(State Only)

- a. A summons and complaint is used to initiate legal action against the Department. It is normally addressed to the officer whose official action is the subject of the complaint. In addition to other functions relating to service in section 2 FAM 511.1, the Executive Office of the Office of the Legal Adviser (L/EX) will accept service on behalf of an officer or former officer named as dependent on the basis of acts arising out of his official duties. If service is made directly on the named officer, the summons and complaint should be promptly forwarded to L/EX.
- b. Under Rule 4 of the Federal Rules of Civil Procedure, service may be made by first class mail. The recipient may acknowledge service through a form enclosed. This form should not be signed and returned without legal advice because doing so may waive procedural defenses. However, if an acknowledgment is not made within 20 days, the defendant may be liable for the cost of personal service. Consequently, it is essential that L be consulted promptly.
- c. In many cases, acknowledgment of service may be made if accompanied by a caveat to the effect that no defenses under Rule 12(b) of the Federal Rules of Civil Procedure and waived therefor.

2 FAM 511.3 The Director General of the Foreign Service and Director of Personnel (M/DGP)

(TL:GEN-233; 8-29-85)
(State Only)

Production of official records or testimony of Departmental or Foreign Service employees on matters within the scope of their official responsibilities, pursuant to judicial subpoena, must be specifically authorized by the Director General of the Foreign Service and Director of Personnel (M/DGP). The Director General shall seek the views of the Office of the Legal Adviser and the geographic or functional office concerned before authorizing or disapproving compliance with the subpoena. In the event either records or testimony sought involve classified information, the security regulations (5 FAM 956) also apply.

2 FAM 511.4 Assistant Secretary for Consular Affairs (CA)

(TL:GEN-233; 8-29-85)
(State Only)

The Assistant Secretary for Consular Affairs, however, may authorize compliance with judicial subpoenas for records or testimony involving the official functions of the Passport Office, the Visa Office, or the Office of Citizen Services. The Assistant Secretary also shall seek the views of the Office of the Legal Adviser and the geographic or functional office involved before acting on the subpoena.

2 FAM 511.5 Assistant Secretary for Legislative and Intergovernmental Affairs (H)

(TL:GEN-233; 8-29-85)
(State Only)

Any subpoena served on behalf of a committee of Congress, for official records or for testimony of an employee, on matters within the scope of their official responsibility will be brought to the attention of the Assistant Secretary for Legislative and Intergovernmental Affairs (H), the Office of the Legal Adviser (L), and the Under Secretary for Management (M). No response shall be made to any Congressional subpoena except upon the specific authorization of the Assistant Secretary for Legislative and Intergovernmental Affairs. In the event the records or testimony sought contain classified information, the security regulations (5 FAM 944) also apply.

2 FAM 512 LEGAL REPRESENTATION OF DEPARTMENTAL EMPLOYEES BY THE

DEPARTMENT OF JUSTICE

(TL:GEN-233; 8-29-85)
(State Only)

The Department of Justice has issued guidelines (28 CFR 50.15(a)) on when and how it will represent Federal employees. This section summarizes the pertinent guidelines and implementation by the Department of State.

- a. The Department of Justice will represent Federal employees in civil and Congressional proceedings in which they are sued, subpoenaed, or charged in their individual capacities, when the acts which constitute the subject of the proceeding reasonably appear to have been performed within the scope of their employment and if representation would otherwise be in the interest of the United States.
- b. Representation is not available in Federal criminal proceedings. In other proceedings, if the employee is the target of a Federal criminal investigation or a defendant in a Federal criminal case, relating to the same subject matter for which representation is sought, no representation by Justice Department attorneys will be provided. If the employee is a target of an investigation concerning the matter for which that employee seeks representation, but no decision to seek an indictment or issue any information has been made, a private attorney may be provided to the employee at Federal expense.
- c. The Department of Justice will not represent, or pay for the representation of any employees, if, with respect to the acts that are the subject of the representation, an indictment or information has been filed against them by the United States or a pending investigation of the Department indicates that they committed a criminal offense.
- d. The Department of Justice will pay for representation by a private attorney when several employees, otherwise entitled to representation by the Department, have sufficiently conflicting interests which in the Department's view preclude representation of each of them by the Department of Justice. The Department of Justice will not provide or pay for representation where the positions taken would oppose positions maintained by the United States itself.
- e. Representation by Department of Justice attorneys also is not available to a Federal employee whenever:
 - (1) The act or acts with regard to which the employee desires representation do not reasonably appear to have been performed within the scope of employment with the Federal Government; or

- (2) It is otherwise determined by the Department of Justice that is not in the interest of the United States to represent the employee.

2 FAM 513 PROCEDURES

(TL:GEN-233; 8-29-85)

(State Only)

- a. When employees believe they are entitled to representation by the Department of Justice in a proceeding, they must submit a request for that representation, together with all process and pleadings served upon them, to the Office of the Legal Adviser forthwith. The Office of the Legal Adviser (unless it finds a request for representation clearly unwarranted) shall submit to the Civil Division, Department of Justice, in a timely manner a statement, with all supporting data as to whether the employees were acting within the scope of their employment, together with its recommendation as to whether representation should be provided. The communication between employees and any individual acting as an attorney at the State Department, with regard to the request for representation, shall be treated as subject to the attorney-client privilege.
- b. In emergency situations, the Civil Division may initiate conditional representation after communication by telephone with the State Department. In such cases, appropriate written data must be subsequently provided. In addition, in view of the 20 day period for acknowledgment of service under Rule 4 of the Federal Rules of Civil Procedure (see section 2 FAM 511.2, paragraph b), United States attorneys are authorized to represent employees to the limited extent of tendering legal advice concerning what response, if any, should be given to service by first class mail. This advice should be particularly useful for employees outside the United States, who may wish to make direct contact to save time.
- c. Upon receipt of the State Department's notification of request for counsel, the Civil Division will determine whether the employee's actions reasonably appear to have been performed within the scope of employment, and whether providing representation is in the interest of the United States. If a negative determination is made, the Civil Division will inform the State Department and/or the employee that no representation will be provided.
- d. If conflicts exist between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as

many groups as necessary to resolve the conflict problem and each group may be provided with separate representation. Some situations may make it advisable that private representation be provided to all conflicting groups and that Justice Department attorneys be withheld so as not to prejudice particular defendants.

- e. Once undertaken, representation will continue until either all appropriate proceedings have ended, or until any one of the foregoing basis for declining or withdrawing from representation is found to exist, including without limitation the basis that representation is not in the interest of the United States. In any of the latter events, the representing Justice Department attorney on the case will seek to withdraw but will insure to the maximum extent possible that the employee is not prejudiced by withdrawal. Any appeal by Justice Department attorneys against an adverse decision may only be taken upon the discretionary approval of the Solicitor General, but employees may pursue an appeal at their own expense.
- f. Justice Department attorneys who represent employees undertake a full and traditional attorney-client privilege. If representation is discontinued for any reason, any incriminating information gained by the attorney in the course of representing the employee continues to be subject to attorney-client privilege. All legal arguments appropriate to the employee's case will be made unless they conflict with the U.S. Government positions. Where adequate representation requires the making of a legal argument which conflicts with a U.S. Government position, the Justice Department shall so advise the employee.

2 FAM 514 WITNESS FEES, TRAVEL EXPENSES, AND SUBSISTENCE

(TL:GEN-233; 8-29-85)
(State Only)

Reimbursement for expenses incurred by an employee giving testimony arising out of the employee's official duties.

2 FAM 514.1 Testimony Given on Behalf of Some Party Other Than the United States or the District of Columbia

- a. When an employee of the Department or Foreign Service is subpoenaed in that employee's official capacity by any court, authority, or party other

than the United States or the District of Columbia and authorized by the Department or Foreign Service to respond to the subpoena, or assigned by the Department or Foreign Service to testify in an official capacity or produce official records of the authority, or party other than the United States or the District of Columbia at a judicial or quasi-judicial proceeding, the employee should collect from the party who obtained the subpoena, and/or from the court or authority involved, all authorized witness fees and subsistence in connection with that testimony.

- b. All amounts so collected for travel expenses and subsistence or per diem should be reported and this report should be submitted with the employee's voucher for reimbursement for expenses related to the employee's testimony. The report should indicate the amount collected, from whom collected, and the time period for which it was collected. Collected amounts will be credited against amounts otherwise payable to the employee by the Department or Foreign Service for travel, subsistence, or per diem in connection with testimony.
- c. All amounts collected as witness fees unrelated to travel and subsistence or per diem for testimony given in an official capacity on behalf of some party other than the United States or the District of Columbia should be reported along with the employee's time and attendance report. The report of fees should indicate the amount collected, purpose for which collected, from whom collected, and the time period for which it was collected. Those fees will be credited against salary otherwise payable for the period in which testimony was given.
- d. In cases where an employee of the Department or Foreign Service gives testimony at a judicial or quasi-judicial proceeding and is entitled to, and actually uses, court leave authorized by 5 U.S.C. 6322, the employee should collect all authorized witness fees and report them on the time and attendance report as described in section 2 FAM 513.1c. Travel, subsistence and per diem expenses received in such cases, when the employee does not receive any equivalent expenses payments from the Department or Foreign Service, may be collected and need not be reported to the Department.

2 FAM 514.2 Testimony on Behalf of the United States or the District of Columbia

(TL:GEN-233; 8-29-85)
(State Only)

When an employee of the Department or Foreign Service is subpoenaed or selected by the Department or Foreign Service to testify or produce official

records at a judicial proceeding on behalf of the United States or the District of Columbia, the employee is performing official duty and should not collect any witness fees. Travel, subsistence, and per diem expenses in connection with the testimony should be paid, collected, reported, and accounted for in the same manner as travel and subsistence expenses connected with any other official business. (See 4 FAM 333.2 , 4 FAM 460 .)

2 FAM 515 THROUGH 519 UNASSIGNED